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No. 08-1392

In the Supreme Court of the United States

NIMATALLAH SHAFFIK MASSIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an alien who conceded before an immigration judge that he is deportable as an aggravated felon and then presented no challenge regarding deportability during an appeal to the Board of Immigration Appeals failed to exhaust administrative remedies, as required by 8 U.S.C. 1252(d)(1), thus precluding judicial review of his claim of non-deportability.

2. Whether the Fifth Amendment affords an alien a right to relief based on the ineffective assistance of privately retained counsel during immigration proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 549 F.3d 631. The decisions of the Board of Immigration Appeals (Pet. App. 21a-23a, 25a-30a) and the immigration judge (Pet. App. 31a-50a, 51a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2008. On February 23, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 8, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has been convicted of an aggravated felony is subject to removal from the United States. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, the term "aggravated felony" is defined as including "a crime of violence (as defined in section 16 of Title 18 * * *) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted).

In a removal proceeding conducted by an immigration judge (IJ), an alien may apply for any relief from removal for which he considers himself eligible. 8 C.F.R. 1240.1, 1240.11. After a hearing, the IJ issues either an oral or written decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). If the IJ enters an order of removal, the statute requires the IJ to "inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties." 8 U.S.C. 1229a(c)(5).

b. The Board of Immigration Appeals (Board) hears appeals from decisions of IJs. 8 C.F.R. 1003.1(b), 1240.15. Regulations direct that an appeal from an immigration judge's decision shall be taken by filing a notice of appeal directly with the Board within 30 calendar days after the date of the decision. 8 C.F.R. 1003.3(a)(1), 1003.38(b). "Briefs in support of or in opposition to an appeal from a decision of an [IJ] shall be filed directly with the Board." 8 C.F.R. 1003.3(c)(1). The Board's practice manual contemplates the possibility of cross-appeals. See Board of Immigration Appeals, Dep't of Justice, *Practice Manual* Ch. 4.7(a)(i) (2004)

<http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm>. Regulations, however, specifically provide that an appeal based on a fact or conclusion of law conceded at the removal hearing can be summarily dismissed. See 8 C.F.R. 1003.1(d)(2)(B); see also *In re Roman*, 19 I. & N. Dec. 855, 856 (B.I.A. 1988) (construing earlier version of same regulation and finding that having "conceded her deportability at the deportation hearing," the alien "cannot contest her deportability on appeal"); *In re In Ku Kim*, No. A047-413-659, 2009 WL 2370858 (B.I.A. July 22, 2009) ("As the respondent conceded his removability at his hearing before the [IJ], he cannot contest his removability on appeal.").

The Board may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). As a general matter, an alien may file only one motion to reopen, and it must be filed within 90 days after the entry of a final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2). A motion to reopen proceedings must state the new facts that will be proved at a hearing if the motion is granted and be supported by affidavits or other evidentiary material. 8 C.F.R. 1003.2(c)(1). "A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Ibid.* The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Abudu*, 485 U.S. 94, 110 (1988) (analogizing a motion to reopen to "a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to

which courts have uniformly held that the moving party bears a heavy burden").

c. The INA also includes a detailed framework for judicial review of final orders of removal. A court "may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d). As originally enacted in 1996, Section 1252 barred court of appeals jurisdiction to review removal orders entered against certain classes of criminal aliens, including those convicted of an aggravated felony. 8 U.S.C. 1252(a)(2)(C) (2000). As a result, many criminal aliens filed petitions for habeas corpus in federal district courts. Congress, however, eliminated habeas corpus review of final orders of removal in Section 106(a) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 310. Now, the sole means of obtaining judicial review of a final order of removal is through a petition for review in a court of appeals. 8 U.S.C. 1252(a)(5). An alien whose criminal conviction previously operated to preclude judicial review of an order of removal may now obtain "review of constitutional claims or questions of law" by means of a petition for review. 8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner, a native and citizen of Jordan, was admitted to the United States in November 1974 as a lawful permanent resident. Pet. App. 3a. On February 3, 1995, petitioner was arrested for chasing his wife and two preschool-age girls with an ax through a residential neighborhood. *Id.* at 4a, 28a. At the time, petitioner was under a court order to avoid contact with his wife and had repeatedly violated that order. *Ibid.* On March 3, 1995, petitioner was charged under Maryland law with intent to murder, carrying a weapon openly with intent to injure, criminal contempt, and reckless endanger-

ment. *Ibid.* On June 6, 1995, petitioner pleaded guilty to one count of reckless endangerment and one count of criminal contempt, and was sentenced to a five-year term of imprisonment. *Id.* at 4a.

b. On June 28, 1996, the former Immigration and Naturalization Service (INS)[1] initiated proceedings against petitioner, alleging that he was deportable under 8 U.S.C. 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony, as defined in 8 U.S.C. 1101(a)(43)(F) (1994) to include a "crime of violence * * * for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years."[2] Pet. App. 4a-5a.

On December 31, 1998, petitioner appeared with counsel before an IJ, conceded that he was deportable as an aggravated felon, and sought a discretionary waiver of deportation under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996).[3] Pet. App. 5a.

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[1] On March 1, 2003, the INS was abolished and many of its functions were transferred to the Department of Homeland Security (DHS). See 6 U.S.C. 251, 271(b), 291.

[2] Later in 1996, Congress reduced the length of the triggering sentence under Section 1101(a)(43)(F) and otherwise amended the provision's phrasing. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Subtit. B, §§ 321(a), 322(a)(2)(A), 110 Stat. 3009-627, 3009-629. The definition now refers to "a crime of violence * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted). "Notwithstanding any other provision of law," the amended definition "applies regardless of whether the conviction was entered before, on, or after [the date of amendment]." 8 U.S.C. 1101(a)(43) (final sentence).

[3] Section 212(c) authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion, and was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v.

The IJ concluded that petitioner was deportable, but ultimately granted petitioner's application for discretionary relief under Section 212(c) on March 19, 2003. *Id.* at 5a, 31a-50a.

c. DHS appealed the IJ's decision to the Board. Pet. App. 6a.; Admin. R. 40-60, 77-80 (A.R.). Petitioner, represented by new counsel, filed a brief in which he argued that the IJ's grant of a Section 212(c) waiver was correct. Pet. App. 6a; A.R. 10-36.

On February 25, 2005, the Board vacated the grant of Section 212(c) relief. Pet. App. 25a-30a. The Board explained that "the facts surrounding" petitioner's attack on his wife, and his "failure to take responsibility for his actions," were "so serious" that they justified denial of any discretionary waiver. *Id.* at 27a. After discussing the facts of petitioner's crime—including evidence that he "would have killed his [wife] had he not fallen down during the chase"—his mental illness, and the prospects for psychiatric treatment, the Board concluded that petitioner "has not shown himself to be a desirable resident of the United States, nor has he demonstrated extraordinary circumstances that might warrant relief." *Id.* at 27a-29a.

d. On March 25, 2005, petitioner, through his second counsel, filed a petition for review with the United States Court of Appeals for the Fourth Circuit, seeking

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St. Cyr, 533 U.S. 289, 295 (2001). In 1996, Congress repealed Section 212(c) and replaced it with a form of discretionary relief that is not available to a criminal alien who has been convicted of an aggravated felony, *id.* at 297, but this Court held in *St. Cyr* that the repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c), *id.* at 314-326.

review of the Board's February 25, 2005 denial of his application for a Section 212(c) waiver. Pet. App. 6a.

3. a. On May 5, 2005, petitioner, after retaining a third counsel, filed a petition for a writ of habeas corpus in the United States District Court for the District of Maryland, seeking "declaratory and injunctive relief to enjoin his imminent removal from the United States." Pet. App. 6a-7a. On June 27, 2005, the district court transferred the habeas petition to the court of appeals pursuant to the REAL ID Act. *Id.* at 7a.

b. On May 25, 2005, petitioner, through his third counsel, filed a motion to reconsider and reopen with the Board, asserting a claim of ineffective assistance by his first counsel, based upon that counsel's concession of petitioner's deportability in December 1998. Pet. App. 7a; see Supp. A.R. 81-98. Petitioner also argued for the first time that his Maryland conviction for reckless endangerment did not constitute a "crime of violence" and thus should not have subjected him to removal proceedings. Pet. App. 7a; see Supp. A.R. 81-98.

On July 26, 2005, the Board denied petitioner's motion to reconsider and reopen. Pet. App. 21a-23a. The Board denied the motion to the extent petitioner requested reconsideration because the request was untimely filed. *Id.* at 21a. The Board denied petitioner's motion to reopen because he had not "file[d] his motion to reopen within a reasonable period of the alleged ineffective assistance." *Id.* at 22a-23a. The Board noted that petitioner had retained new counsel in April 2004 (against whom he did not assert any claim of ineffective assistance) and could have filed a "motion to remand proceedings based on ineffective assistance" of counsel at any time while his case was on appeal to the Board, but he had instead waited to raise his ineffective-assis-

tance claim "until almost 3 months after [the Board's] February 25, 2005 decision" denying his request for Section 212(c) relief. *Id.* at 23a.

c. On August 19, 2005, petitioner filed a petition for review with the court of appeals seeking review of the Board's July 26, 2005 denial of his motion to reconsider and reopen. Pet. App. 8a.

4. The court of appeals consolidated the two petitions for review (of the Board's February 2005 and July 2005 decisions) and the habeas petition that had been transferred from district court. Pet. App. 8a. On December 9, 2008, the court of appeals denied or dismissed all three petitions. *Id.* at 1a-20a.

a. The court of appeals affirmed the Board's July 2005 decision denying petitioner's motion to reopen. Pet. App. 10a-14a. First, as to the argument that his first counsel's concession of deportability at his 1998 immigration hearing was plainly ineffective, the court concluded that the Board did not abuse its discretion in rejecting that argument because the state of the law at the time of petitioner's hearing supported the Board's determination. *Id.* at 11a-12a. The court further concluded that petitioner's first counsel's concession was understandable given counsel's decision to seek a discretionary waiver under former Section 212(c), which the IJ granted. *Id.* at 13a. Thus, the court concluded that petitioner had not shown that the Board abused its discretion in refusing to allow him to "revisit" his concession of deportability by asserting an ineffective assistance of counsel claim. *Ibid.* Second, the court concluded that petitioner failed to show that the Board abused its discretion in denying his motion to reopen and reconsider because the Board noted that petitioner "chose to solely respond to the DHS's appeal" of the IJ's grant of Sec-

tion 212(c) relief; failed to file a motion to remand proceedings based on ineffective assistance of counsel while the case was pending appeal before the Board; and delayed "until almost 3 months after [the Board's] February 25, 2005 decision to raise his ineffective assistance of counsel claim." *Ibid.* (brackets in original). Finally, the court concluded that petitioner's due process claim based on alleged ineffective assistance of counsel was foreclosed by its decision in *Afanwi* v. *Mukasey*, 526 F.3d 788, 796-799 (4th Cir. 2008), cert. granted, judgment vacated and remanded, No. 08-906 (Oct. 5, 2009), which it described as holding "that an alien's 'counsel's actions do not implicate the Fifth Amendment,' such that the counsel's alleged ineffectiveness [in civil removal proceedings] does 'not deprive [an alien] of due process.'" Pet. App. 13a-14a (citation omitted).

b. Turning to petitioner's "seek[ing] to revisit his original concession of deportability on * * * substantive ground[s] * * *, rather than through the portal of an ineffective assistance of counsel * * * claim," the court of appeals dismissed petitioner's "claim that he is not deportable as a convicted aggravated felon * * * for lack of jurisdiction." Pet. App. 14a, 20a. Relying upon its case law and that of other circuits, the court held that, under 8 U.S.C. 1252(d)(1), petitioner may not raise an issue to the court that he did not raise previously before the IJ and the Board and that, therefore, the court lacked jurisdiction to consider petitioner's claim. Pet. App. 14a-17a. The court was not persuaded by petitioner's argument that he had no reason to raise the deportability issue before the Board because DHS had appealed the separate issue of the IJ's grant of a Section 212(c) waiver. *Id.* at 17a-18a. The court held that, by conceding deportability before the IJ, petitioner

"declined to raise the [deportability] issue * * * before the IJ; that he, therefore, failed to exhaust his administrative remedies; and that the court thus lacked jurisdiction to consider the issue. *Ibid.* Finally, the court held that, under *Bowles* v. *Russell*, 551 U.S. 205 (2007), petitioner "may not rely on a 'miscarriage of justice' argument to revisit his concession of deportability and circumvent his failure to exhaust administrative remedies." Pet. App. 18a-20a. The court held that, because it "may not create an equitable exception to [S]ection 1252(d)(1)'s exhaustion requirement," it lacked jurisdiction to consider the merits of petitioner's claim that he had not been convicted of an aggravated felony that rendered him deportable. *Id.* at 20a.

ARGUMENT

Petitioner challenges (Pet. 11-29) the court of appeals' holding that the exhaustion requirement in 8 U.S.C. 1252(d)(1) is mandatory, jurisdictional, and not subject to judicially created equitable exceptions. That holding is correct, and it does not directly conflict with any decision of this Court or of any court of appeals—especially since the briefs in the court of appeals do not bear out petitioner's repeated statements (Pet. 9, 12, 19, 20, 26-27) that the government failed to raise in the court of appeals petitioner's concession of deportability before the IJ and the Board. Further review of the first question presented is therefore not warranted.

Petitioner also renews his claim (Pet. 30-34) that he had a constitutional right to effective performance by his privately retained counsel in removal proceedings. Relying on circuit precedent that has since been vacated on other grounds, the court of appeals correctly held that there is no Fifth Amendment right to effective perfor-

mance by privately retained counsel in removal proceedings. Because the case law in the courts of appeals on the constitutional question is still developing, this Court's review is unwarranted.

1. a. Exhaustion doctrines generally "provide[] 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As this Court has explained, requiring administrative exhaustion serves a number of important purposes, including "preventing premature interference with agency processes"; allowing the agency to "function efficiently" and "correct its own errors"; providing the "parties and the courts the benefit of [agency] experience and expertise"; assuring the development of a record "adequate for judicial review"; and affording the agency an opportunity to decide whether a claim is "invalid" on other grounds or whether relief may be granted "under a different section of the Act." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); accord *McKart*, 395 U.S. at 193-194. Where Congress has specified by statute that exhaustion is required, a court may not "dispens[e]" with that requirement based on the court's own assessment that exhaustion would be "futil[e]." *Salfi*, 422 U.S. at 766. The Court reiterated that point more categorically in *Booth* v. *Churner*, 532 U.S. 731 (2001), explaining that it "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n.6.

In this case, Congress has specified in the INA that judicial review of a final order of removal is contingent on exhaustion of the administrative remedies "available

to the alien as of right." 8 U.S.C. 1252(d)(1). The statutory framework, which requires an IJ to advise an alien of his "right to appeal" a removal order, 8 U.S.C. 1229a(c)(5), plainly allocates initial appellate review to the Board and makes such an appeal "available as of right" within the meaning of the exhaustion mandate in Section 1252(d)(1). That conclusion is reinforced by 8 U.S.C. 1101(a)(47)(B), which specifies that an IJ's removal order becomes final only upon affirmance by the Board or upon expiration of the appeal period if no appeal to the Board is taken, whichever is earlier. Whether the Board would ultimately rule for the alien on the merits is irrelevant to whether an appeal to the Board—the relevant procedural remedy here—is "available to the alien as of right." And, consistent with Congress's directives, Department of Justice regulations provide that an IJ's removal order may not be executed during the appeal period or while review of the order is pending before the Board. 8 C.F.R. 1003.6(a). Cf. *Darby* v. *Cisneros*, 509 U.S. 137, 154 (1993) (concluding that "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review").

That statutory mandate of exhaustion serves to vest exclusive initial appellate jurisdiction in the agency. See *Bowles* v. *Russell*, 551 U.S. 205, 212-213 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). Given the statutory underpinnings of the exhaustion requirement in removal proceedings, the court of appeals correctly applied this Court's decision in *Bowles* when it con-

cluded that the requirement is mandatory and that petitioner's decision not to exercise his right to challenge his deportability before the Board precluded the court from considering that question. Pet. App. 16a-20a. As this Court recognized in *Bowles*, Congress has not authorized the federal courts to excuse non-compliance with statutory prerequisites to judicial review, and such judicially created exceptions "would no doubt detract from the clarity of the rule." 551 U.S. at 214.

Against that background, the court of appeals correctly concluded that it lacked jurisdiction over petitioner's claim of non-deportability. "A court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). As petitioner implicitly concedes, exhaustion of administrative remedies requires at a minimum that an alien first present his claim to the IJ and that he then pursue his claim on appeal to the Board. Petitioner did neither here. See Pet. 20 (describing 8 U.S.C. 1252(d)(1) as requiring that an alien "fully proceed before the agency prior to pursuing judicial review"), 21 (acknowledging that several courts of appeals have held that a court may not entertain a petition for review where an alien failed to proceed at all before the agency). Rather, petitioner affirmatively conceded his deportability before the IJ and then failed to seek to withdraw that concession or otherwise challenge his deportability when his case was on appeal to the Board—focusing instead on the question of whether he was entitled to discretionary relief from removal. Petitioner thereby failed to avail himself of his prescribed administrative remedies as to any claim of non-deportability. Cf. *United States* v. *Broce*, 488 U.S. 563 (1989) (criminal defendant who pleads guilty cannot

later contend that the charge did not establish a crime or that he had a good defense). The court of appeals correctly concluded that petitioner's failure to exhaust administrative remedies barred its review of his claim.

b. Petitioner contends (Pet. 20-26) that there is a fundamental difference between exhaustion of remedies and issue exhaustion, and that Section 1252(d)(1) requires only the former. As an initial matter, petitioner's characterization of this case as one involving mere issue exhaustion is itself flawed. Petitioner did not merely fail to raise the question of his deportability on appeal to the Board; he affirmatively *conceded* before the IJ that he is deportable, seeking only relief from ensuing deportation under Section 212(c).

In any event, petitioner does not address this Court's emphasis that when agency regulations require issue exhaustion, "courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Sims* v. *Apfel*, 530 U.S. 103, 108 (2000). Thus, "since the BIA's regulations do require issue exhaustion," the Second Circuit has, for example, "long held that issue exhaustion is mandatory" in proceedings to review a Board decision. *Zhong* v. *United States Dep't of Justice*, 489 F.3d 126, 131 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc) (citing 8 C.F.R. 1003.3). Moreover, as this Court has explained, "the rationale for requiring issue exhaustion is at its greatest" in "an adversarial administrative proceeding," *Sims*, 530 U.S. at 110, like the one petitioner had before the Board.

Accordingly, even if the exhaustion requirement in Section 1252(d)(1) were not jurisdictional (in the absolute sense that it could not be waived by the government), it would still be mandatory, and thus preclude

petitioner's claim. See *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2564-2567 (2008) (declining to decide whether a statutory requirement that the government appeal or cross-appeal a criminal sentence is "jurisdictional," but recognizing no judicial discretion to make exceptions to that requirement); *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (explaining that, even when a time limit in a procedural rule is not "jurisdictional," the court's duty to apply it is "mandatory" when the other party raises an objection).

c. Because a non-jurisdictional requirement can still be "mandatory" for a court when the other party raises an objection, this case is a poor vehicle for testing the "jurisdictional" nature of the exhaustion requirement in Section 1252(d)(1).

Petitioner's efforts to establish that issue exhaustion is not jurisdictional are ultimately in service of his attempt to show that it can be "waived in certain, well-settled circumstances." Pet. 9. He claims those circumstances are present here because this is "the rare case * * * where (1) the government has waived its argument that an alien has not exhausted an issue, (2) that issue is a purely legal question, and (3) manifest injustice would result from the court's failure to reach the issue." Pet. 26. Although he relies on the concatenation of all three of those factors more than once (Pet. 9, 12, 26), he places particular emphasis on the government's alleged failure to "invoke exhaustion on appeal" (Pet. 20).

In this case, however, it is simply not true that petitioner's failure to exhaust was waived by the government in the court of appeals. To the contrary, in its opposition in the court of appeals to petitioner's motion to

hold his first petition for review in abeyance, the government expressly stated as follows:

> The habeas petition, once transferred here, will still not confer jurisdiction on this Court to review the ground on which [petitioner] was removed because *he failed to exhaust his administrative remedies* with regard to any such challenge *(by never contesting his deportability below)*. 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right.").

05-1329 Resp. C.A. Mot. to Dismiss and Opp. to Pet'r Mot. to Hold Case in Abeyance 14 n.5 (filed June 10, 2005) (emphases added). When petitioner later filed his opening brief in the consolidated proceeding involving his habeas petition and two petitions for review, he referred back to that very point, stating: "The Government has argued in this case that the merits of [petitioner's] deportability are not before this Court because [petitioner] did not properly raise that issue before the BIA during his initial removal proceedings." Pet. C.A. Br. 37. Then, in its own brief in the consolidated proceeding, the government repeated the substance of the exhaustion argument that petitioner had already paraphrased (albeit without citing Section 1252(d)(1)). See Resp. C.A. Br. 12 ("[Petitioner] conceded before the IJ that he was deportable as charged * * * . Thus, it is wholly improper for [petitioner] to seek to collaterally attack this concession by implying this Court can directly review the question of removability in this petition for review.").

The court of appeals itself never suggested that the government had waived petitioner's failure to exhaust his claim that he was not deportable. To the contrary, the court said at the beginning of its discussion of deportability that "[petitioner] does not dispute that he failed to raise the issue before either the IJ or the [Board]." Pet. App. 14a. It would, to say the least, be odd to rely on petitioner's failure to "dispute" something if the court thought it had not even been raised by the government. In addition, when discussing its inability to create equitable exceptions to the exhaustion requirement, the court of appeals specifically discussed exceptions for a "miscarriage of justice" or "manifest injustice," but not any waiver by the government. *Id.* at 14a, 18a-20a.[4]

d. Because the government did not waive petitioner's failure to exhaust, there is no direct conflict in the courts of appeals. Indeed, petitioner's claims of conflict depend almost entirely on the government's purported waiver of exhaustion. Petitioner says (Pet. 12) that the decision below "squarely conflicts with decisions of the Second and Seventh Circuits," because those circuits have held that exhaustion can be waived by the government. Thus, petitioner describes (Pet. 13) the Seventh Circuit's decision in *Abdelqadar* v. *Gonzales*,

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[4] The implication that the court of appeals did not perceive the government to have waived the exhaustion point is strengthened by the fact that—notwithstanding the statement in petitioner's opening brief—petitioner affirmatively argued in his reply brief that the government had "waived any argument that [petitioner] failed to exhaust the issue of his deportability." Pet. C.A. Reply 7 n.5. Nevertheless, the court of appeals did not include waiver among the exceptions that it felt constrained not to recognize by its characterization of the exhaustion requirement as jurisdictional.

413 F.3d 668 (2005), as "[e]mphasizing that the government failed to raise exhaustion in its appellate brief," and he quotes (Pet. 13) the Seventh Circuit's statement in *Korsunskiy* v. *Gonzales*, 461 F.3d 847 (2006), that an agency "may waive or forfeit the exhaustion issue." *Id.* at 849. Petitioner similarly describes the Second Circuit as holding "that the statutory requirement of issue exhaustion is 'mandatory (and hence waivable)' but is not jurisdictional." Pet. 14 (quoting *Lin Zhong* v. *United States Dep't of Justice*, 480 F.3d 104, 107 (2d Cir. 2007)).

Furthermore, petitioner's characterization of the Fourth Circuit as being an outlier "even in the 'jurisdictional' circuits," depends on his conclusion that none of the other circuits "has actually held that a court of appeals lacks power to entertain a challenge to a removal order where the government has not argued that the challenge is barred because it was not properly exhausted before the agency." Pet. 19 (emphasis omitted). He characterizes Sixth Circuit cases as recognizing an exception to the exhaustion requirement when the government does not argue failure to exhaust on appeal. Pet. 15-16 (discussing *Al-Najar* v. *Mukasey*, 515 F.3d 708, 713 n.2 (2008); *Badwan* v. *Gonzales*, 494 F.3d 566, 571 (2007)).

The other cases he cites (Pet. 16-18)—from the First, Eighth, Ninth, and Tenth Circuits—do not establish a direct conflict either, since they discussed different potential exceptions to the exhaustion requirement without finding them applicable or even necessarily available. See *Batrez Gradiz* v. *Gonzales*, 490 F.3d 1206 (10th Cir. 2007) (analyzing miscarriage-of-justice exception, but finding it inapplicable in that case); *Frango* v. *Gonzales*, 437 F.3d 726, 728-729 (8th Cir. 2006) (mentioning cases from non-immigration contexts that recognized excep-

tions to exhaustion requirements, but finding none applicable to the "adversarial" proceedings "before the IJ and the BIA"); *Sun* v. *Ashcroft*, 370 F.3d 932, 942-944 (9th Cir. 2004) (suggesting there may be a futility exception to Section 1252(d)(1)'s exhaustion requirement, but finding any such exception "cannot be broader than that encompassed by the futility exception to prudential exhaustion requirements" and thus could not be satisfied in that case); *Sousa* v. *INS*, 226 F.3d 28, 32 (1st Cir. 2000) (finding it "unnecessary * * * to decide whether, in a case that threatened a miscarriage of justice, we could forgive the failure to raise a clearly meritorious claim in the removal proceedings"). Moreover, almost all of those decisions preceded this Court's decision in *Bowles*, *supra*, which caused the Second Circuit to overrule prior opinions to the extent that they had recognized a "'manifest injustice' exception to [Section] 2152(d)(1)'s exhaustion requirement." *Grullon* v. *Mukasey*, 509 F.3d 107, 115-116 (2007), cert. denied, 129 S. Ct. 43 (2008). The only exception is the Tenth Circuit's decision in *Batrez Gradiz*, which post-dated *Bowles* by only six days and did not mention it at all.[5]

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[5] Although petitioner briefly discusses (Pet. 28-29) a miscarriage-of-justice exception, as the court of appeals explained here (Pet. App. 12a), petitioner's argument that he is not deportable depends on Supreme Court and court of appeals cases that postdated the IJ's 1998 decision (*id.* at 51a-53a) that he was deportable. Cf. *In re Malone*, 11 I. & N. Dec. 730, 731-732 (B.I.A. 1966) (suggesting that collateral challenges based on a "gross miscarriage of justice" are available in cases in which deportation was inappropriate "at the time of the original proceeding," but are not available on the basis of "an interpretation of law made subsequent to the time of the original deportation decision"). Furthermore, because a manifest-injustice exception—to the extent one were available—would be "equitable" in nature, *Grullon*, 509 F.3d at 115, it is surely relevant that petitioner's criminal conduct, which included the

Accordingly, it is not at all clear that petitioner would have had his claim of non-deportability adjudicated in any of the other circuits he cites.

e. Finally, petitioner argues (Pet. 28-29) that he did in fact exhaust his claim, and that the court of appeals therefore erred in not finding that he exhausted his non-deportability claim by raising it before the Board in a motion to reopen. That factbound claim does not warrant further review (but would, if true, obviate any need to address any of petitioner's arguments about the legal nature of the exhaustion requirement). In any event, petitioner essentially invited any error by claiming in the court of appeals that he had "timely raised in the BIA *the ineffectiveness claim* in a motion to reopen," not the underlying question of deportability. Pet. C.A. Br. 37 (emphasis added). The Board rejected that ineffectiveness claim, as did the court of appeals, without needing to address the underlying question of deportability. Moreover, petitioner could have presented his non-deportability claim either during the initial appeal before the Board—which was handled by his second counsel, against whom petitioner has never asserted a claim of ineffective assistance—or in a motion to remand during the pendency of that Board appeal.

2. Petitioner contends (Pet. 30-34) that the concession of deportability by his first privately retained counsel constituted ineffective assistance that deprived him of due process in violation of the Fifth Amendment. Further review of that claim is unwarranted.

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violation of a court order to avoid contact with his wife (Pet. App. 28a), has furnished an independent ground of deportability for such actions occurring since 1996, see 8 U.S.C. 1227(a)(2)(E)(ii); *In re Gonzalez-Silva*, 24 I. & N. Dec. 218, 220 (B.I.A. 2007).

a. Petitioner "adopts and incorporates by reference the legal arguments" that were made in the petition for a writ of certiorari in *Afanwi* v. *Holder*, No. 08-906, which was pending when he filed his own petition. On October 5, 2009, this Court granted the certiorari petition in *Afanwi*, vacated the Fourth Circuit's judgment, and remanded "for further consideration in light of the position asserted by the Solicitor General in her brief for the respondent filed August 26, 2009." 08-906 Docket entry (Oct. 5, 2009). The position asserted by the Solicitor General in that brief was that the Fourth Circuit in *Afanwi* correctly held that the Fifth Amendment does not confer a right to have an order of removal set aside based on ineffective assistance by privately retained counsel in immigration proceedings (see Br. in Resp. at 10-12, *Afanwi*, *supra* (No. 08-906)), but nevertheless erred in affirming the Board's determination in that case that it lacked jurisdiction to consider in the first instance whether it should grant administrative relief for allegedly ineffective assistance of counsel that occurred after entry of a final order of removal (see *id.* at 14-16).

b. The court of appeals correctly held in this case that the Fifth Amendment does not confer a right to effective assistance by privately retained counsel in immigration proceedings. Pet. App. 13a-14a. This Court has explained that when the government is not constitutionally required to furnish counsel in the relevant proceedings, the errors of privately retained counsel are not imputed to the government. See *Coleman* v. *Thompson*, 501 U.S. 722, 752-754 (1991). When "[t]here is no constitutional right to an attorney" furnished by the government in a particular kind of proceeding, a client "cannot claim constitutionally ineffective assistance of counsel in

such proceedings"; in that situation, the attorney performs in a private capacity as the client's agent, not a state actor, and the client therefore must "'bear the risk of attorney error.'" *Id.* at 752-753 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)). In "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent." *Id.* at 753 (quoting *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962)).

There is no constitutional right to appointed counsel in immigration proceedings. Indeed, while Congress has recognized the "privilege" of being represented by counsel of the alien's choice, it has expressly provided that such representation shall be "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (parallel provision providing that a party may appear through counsel in any court of the United States). Accordingly, when an alien has invoked that statutory privilege and retained a lawyer to represent him in removal proceedings or in filing a petition for review, counsel's actions are not those of the government, but are instead attributed to the client.

Petitioner incorporates (Pet. 31) the argument from the *Afanwi* petition that the "state action" that is needed to find a due process violation in this context arises when the government relies on the removal order at the end of the proceeding. See Pet. at 26, *Afanwi*, *supra* (No. 08-906). But that contention proves too much, because it would preclude the government from relying on any civil court order without exposing itself to the risk of collateral litigation about asserted malpractice on the part of opposing counsel. Similarly, the incorporated attempt (see *id.* at 19-20) to distinguish removal proceedings from other civil litigation also fails. The *Afanwi* petition argued that, because a removal

proceeding threatens to impose such a great loss on an alien, it is "barely distinguishable from criminal condemnation" and thus triggers a Fifth Amendment right to the effective assistance of counsel analogous to that available in the criminal context. *Id.* at 19 (quoting *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 119 (1996)). This Court, however, has resisted calls to view immigration proceedings as equivalent to criminal trials. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the [immigration] proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); see also *Negusie* v. *Holder*, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'") (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893)). And if it were the case that immigration proceedings should be treated like criminal proceedings with respect to issues of legal representation, the Constitution would require the government to furnish counsel to those facing removal proceedings. But there is no such constitutional requirement, and petitioner does not contend otherwise. In the absence of any requirement of that kind, claims like petitioner's—which concern only privately retained counsel—have no apparent basis.

c. Petitioner correctly explains (Pet. 30-31) that there is disagreement in the courts of appeals about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective performance by their privately retained counsel. The Seventh Circuit and the Eighth Circuit have held there is no such constitutional right. See *Magala* v. *Gonzales*, 434 F.3d 523,

525-526 (7th Cir. 2005);[6] *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). So did the Fourth Circuit in its recently vacated opinion in *Afanwi*. 526 F.3d at 796-799. By contrast, a number of other circuits have suggested or held that the Due Process Clause creates a right to assistance by counsel that is sufficiently effective to prevent removal proceedings from being fundamentally unfair. See *Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601 (2d Cir. 2008); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003); *Nehad* v. *Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005).

Notwithstanding that disagreement among the courts of appeals, this Court should not resolve the constitutional question at this time. Jurisprudence on the issue is still developing in the courts of appeals. Notwithstanding the trend of the earlier decisions, the Fourth and Eighth Circuits decided last year that there is no constitutional entitlement. See *Rafiyev*, 536 F.3d at 861; *Afanwi*, 526 F.3d at 796-799. And a recent Ninth Circuit decision "assume[d]" without deciding that aliens have "a constitutional right to the assistance of counsel

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[6] As petitioner notes (Pet. 31 n.14), other Seventh Circuit decisions do contemplate that counsel in immigration proceedings "may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause." *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (1998) (quoting *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993)). Petitioner also quotes (Pet. 31 n.14) the passing reference to the Fifth Amendment in *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007), but the court's holding there was that the alien "did not have the fair hearing to which *the immigration statutes* entitle her." *Id.* at 649 (emphasis added).

in immigration proceedings." *Alcala* v. *Holder*, 563 F.3d 1009, 1015 n.11 (2009).

d. In any event, resolution of the constitutional question here would not aid petitioner, because his first counsel was not ineffective. As the court of appeals concluded, the state of the law at the time of petitioner's 1998 deportation hearing supported his counsel's decision to concede petitioner's deportability. Pet. App. 11a-13a. That decision was thus not unreasonable. *Id.* at 12a-13a. Moreover, as the court of appeals noted (*id.* at 13a), "[s]uch a concession is particularly understandable in light of counsel's decision" to apply for a Section 212(c) waiver (an application that met with success before the IJ). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (brackets in original) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984)).

In addition, petitioner failed to exercise due diligence in pursuing his claim, which is a prerequisite for seeking reopening on the basis of a claim of ineffective assistance. See, *e.g.*, *Rashid* v. *Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008) (explaining that an alien claiming ineffective assistance of counsel "is required to exercise due diligence both before and after he has or should have discovered ineffective assistance of counsel"). Rather than raising a claim of ineffective assistance while his case was on direct appeal to the Board—and while he was being represented by new counsel whom he does not allege to have been ineffective—petitioner delayed bringing any such claim until almost three months after the Board had already reversed the grant of Section 212(c) relief. Pet. App. 13a, 22a-23a. To countenance

petitioner's decision not to claim ineffective assistance during his original proceedings would reward delay in a context where "every delay works to [his] advantage." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); see *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) ("Granting such motions too freely will permit endless delay of deportation."). Because the court of appeals properly found that the Board did not abuse its discretion in denying petitioner's motion to reopen (Pet. App. 13a), resolution of the constitutional question is unnecessary and would not alter the outcome of the proceedings below. Further review of petitioner's constitutional claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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